BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROXANNE PETERS	)	
Claimant	)	
	)	
VS.	)	
	)	
BIG LAKES DEVELOPMENT CENTER	)	
Respondent	)	Docket No. 237,263
	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appealed from a May 17, 2001 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The parties agree that claimant sustained personal injury by accident on October 27, 1997, and that the accident arose out of and in the course of her employment with respondent. The Administrative Law Judge nevertheless partially denied claimant's request for certain additional medical treatment because claimant failed to prove her carpal tunnel syndrome condition is related to that accident. Specifically, Judge Benedict authorized Dr. Moore "to treat the Claimant's RSD/complex regional pain syndrome. However, as the Claimant's carpal tunnel syndrome is unrelated to her work accident the Respondent is not responsible for providing treatment for this." Accordingly, the issue is causation and, more specifically, whether claimant's recently diagnosed carpal tunnel syndrome (CTS) is the result of the October 27, 1997, accidental injury that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant injured multiple body parts, including her right wrist, on October 27, 1997, when she slipped and fell. Respondent provided claimant medical treatment with a series of physician's, including Drs. Steven J. Mosier, Nanda N. Kumar and William T. Jones. Claimant was referred by her attorney to Lynn Ketchum, M.D., who examined the claimant on December 4, 1998, and diagnosed reflex sympathetic dystrophy (RSD) or a pain syndrome. On February 17, 1999, Judge Benedict ordered an independent medical examination by Dr. John B. Moore. Dr. Moore disagreed with the diagnosis of RSD, instead describing claimant's condition as a regional maintained pain syndrome (RMPS). He also ordered an EMG by Dr. Zwibleman, which revealed mild carpal tunnel syndrome. In his report dated December 22, 2000, Dr. Moore stated: "I have no reason to believe that the slip and fall accident of 10/26/97 has caused Ms. Peters' carpal tunnel syndrome." But Dr. Moore went on to say that "[i]n order to treat the RMPS (regional maintained pain syndrome) it is necessary to treat the carpal tunnel syndrome also even though the carpal tunnel syndrome was not caused by the fall."[1]

Although it was suspected, none of the several physicians that examined claimant before the January or February 2000 EMG by Dr. Zwibleman diagnosed CTS. No physician has related claimant's CTS to her October 27, 1997, accident.

An ALJ's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.[2] A dispute concerning medical treatment is not jurisdictional, but "a finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."[3] Whether claimant's condition and present need for medical treatment is due to the work-related accident or, instead, the result of a preexisting condition or a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of her prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The question of whether a worker's injury arose out and in the course of employment is a question of fact.[4] It is well established that the Board conducts a *de novo* review of an ALJ's findings of fact based on the record presented to the ALJ.[5]

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[1] Claimant's Ex. 1, Regular [sic] Hearing Transcript dated May 16, 2001.

[2] K.S.A. 44-551(b)(2)(A).

[3] K.S.A. 44-534a(a)(2).

[4] Harris v. Bethany Medical Center, 21 Kan. App.2d 804, 805, 909 P.2d 657 (1995).

[5] K.S.A. 44-555c(a); Helms v. Pendergast, 21 Kan. App.2d 303, 309, 899 P.2d 501 (1995).

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[7] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[8]

Claimant attributes all her right upper extremity symptoms to the October 27, 1997, slip and fall that occurred while working for respondent. But there is no expert opinion relating the CTS to that work-related accident. The CTS was first diagnosed by a physician that did not examine claimant until over two years after her accident. This case is further complicated by the fact that claimant was involved in a motor vehicle accident in August 1999.

Although Dr. Moore believes claimant's CTS preexisted her October 27, 1997, accident, he still considers the CTS to be a component of the RMPS. Dr. Moore states in his December 22, 2000 report that "the preexisting or coexisting mild carpal tunnel syndrome can be a trigger that continues the regional maintained pain syndrome. . . . [T]he preexisting or coexisting carpal tunnel syndrome simply adds fuel to the fire and keeps the maintained pain syndrome going."[9] What neither Dr. Moore nor any other medical expert says, however, is either that the work-related accident or the RMPS contributes to or aggravates the CTS. Because of this and because of the inconsistent diagnoses and symptoms, together with the length of time that has passed since claimant's accident, the Appeals Board finds that claimant has failed to carry her burden of proving her carpal tunnel syndrome is work-related. Nevertheless, claimant may be entitled to the requested medical treatment as a necessary part of the treatment for the admittedly compensable injury.[10] This issue, however, is not jurisdictional and cannot be reviewed at this stage of the proceeding. Therefore based upon the record compiled to date, the Administrative Law Judge's denial of this preliminary benefit should be affirmed.

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[6] K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993), and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[7] K.S.A. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 44-501(g).

[9] Claimant's Ex. 1, Regular [sic] Hearing Transcript dated May 16, 2001.

[10] K.S.A. 44-510h(a).

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.[11]

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the May 17, 2001, Order by Administrative Law Judge Bryce D. Benedict, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2001.

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
Michael J. Haight, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

[11] K.S.A. 44-534a(a)(2).